Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

KINGSTON CONSTRUCTORS INC.

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Respondent.

Petition for Writ of Certiorari
To the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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30pp

QUESTIONS PRESENTED

The Washington Metropolitan Area Transit Authority ("WMATA") Compact, Section 81 provides:

> The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against [WMATA] and to enforce subpoenas issued under [the WMATA Compact]. Any such action initiated in a State Court shall be removable to the appropriate United States District Court in the manner provided by Act of June 25, 1948, as amended (28 U.S.C. 1446).

The courts of California have held this language prohibits the courts of all states, except those of Maryland and Virginia, from exercising any jurisdiction over actions involving WMATA. The questions presented here are:

> Can the language of Section 81 of the WMATA Compact impliedly strip jurisdiction, with respect to WMATA, from the courts of all states except Maryland and Virginia or must the Compact expressly do so?

> Do the Constitution and laws of the United States allow Congress, through the compact process, to place states' judiciaries upon an unequal footing?

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PETITION FOR WRIT OF CERTIORARI

Kingston Constructors Inc. ("Kingston"), respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of California, entered on January 9, 1997, to determine a question regarding the validity, interpretation, and application of a statue of the United States, i.e., WMATA Compact, Section 81, (Pub.L. No. 89-774 (Vol. 6, 1966) § 1, 80 Stat.)

A LIST OF ALL PARTIES TO THE PROCEEDING, INCLUDING PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Power Energy Industries

Kingston Constructors Inc.

Washington Metropolitan Area Transit Authority

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THIS CASE

Default Judgment, California Superior Court, County of Los Angeles, Case No. BC056254, Entered on May 5, 1994

Order Vacating Default Judgment, California Superior Court, County of Los Angeles, Case No. BC056254, Entered on September 1, 1994

Opinion, Division Two of the Second Appellate District of the Court of Appeal of California, Entered on April 3, 1996,

Opinion, Supreme Court of California, Case No. S053577, Entered on January 9, 1997

JURISDICTION IN THIS COURT

On January 9, 1997, the Supreme Court of California held that the courts of the State of California have no jurisdiction over WMATA.

Such a decision being a final decree rendered by the highest court of the State of California in which a decision could be had, the jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257.

Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of January 9, 1997, the date upon which the opinion of the California Supreme Court was entered by the clerk thereof.

CONSTITUTIONAL PROVISIONS AND STATUTES, INVOLVED IN THIS CASE

UNITED STATES CONSTITUTION -- ARTICLE ONE

Section 10. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

UNITED STATES CONSTITUTION -- ARTICLE THREE

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other

cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

UNITED STATES CONSTITUTION --ARTICLE FOUR

Section 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, But shall be delivered up on claim of the party to whom such service or labor may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

BILL OF RIGHTS -- ARTICLE TEN

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

BILL OF RIGHTS -- ARTICLE ELEVEN

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by citizens or subjects of any foreign State.

28 U.S.C. 1446

> (a) A defendant or defendants desiring to remove any civil action ... from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice or removal ...
>
> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading ....

AN ACT FOR THE ADMISSION OF THE STATE OF CALIFORNIA INTO THE UNION

> Whereas the people of California have presented a constitution and asked admission into the Union, which constitution was submitted to Congress by the President of the United States, by message dated February thirteenth, eighteen hundred and fifty, and which, on due examination is found to be republican in its form of government:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of California shall be one, and hereby declare to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

. . . .

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY COMPACT, ARTICLE XVI - JURISDICTION OF COURTS - SECTION 81

The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against the Authority and to enforce subpoenas issued under this Title. Any such action initiated in a State Court shall be removable to the appropriate United States District Court in the manner provided by . . . .

STATEMENT OF THE CASE

WMATA is an interstate compact agency created by agreement between Congress and the States of Maryland and Virginia pursuant to the Washington Metropolitan Area Transit Authority Compact ("the Compact") by Public Law No. 89-774 (1966) 80 Stat. 1324.

WMATA owns and operates a light rail system in the area of the District of Columbia.

In or about October, 1990, WMATA invited bids for a contract to replace certain transformers used in the WMATA light rail system.

WMATA and Kingston entered into a contract whereby Kingston was to supply and install the replacement transformers. Power Energy Industries (hereinafter "PEI") entered into a contract with Kingston in Los Angeles County, California, to design and manufacture the replacement transformers. PEI's sales office and manufacturing facility were at all times located in Los Angeles County, California.

Subsequently, disputes arose over the performance of the transformers, WMATA's demands for additional testing, WMATA's refusal to allow installation of the transformers, and WMATA's demands for other performance not specified in the contract. WMATA directed Kingston to terminate the PEI/Kingston contract and refused to pay for the transformers delivered by PEI.

On May 28, 1992, when it became apparent PEI would not receive payment for the transformers which had been completed and delivered, PEI filed suit. The complaint named Kingston and WMATA as defendants. WMATA was served with the Complaint.

The PEI complaint asserted tort claims against WMATA for inducing breach of contract, and interference with an advantageous business relationship.

On July 24, 1992, WMATA's General Counsel sent a letter addressed to Mr. James H. Dempsey, Clerk of the Superior Court for the County of Los Angeles, which stated that WMATA would not enter an appearance in the case. A copy of this letter was sent to PEI's attorney of record.

PEI's attorney immediately wrote to WMATA's attorney, advising him that such a letter was not an appropriate response to the Complaint, and further advising that if no appropriate response was filed, WMATA's default would be taken.

On August 4, 1992, a copy of a Request for Entry of Default was mailed to WMATA's Managing Director. The Clerk entered a default on October 19, 1992.

On December 22, 1993, after settlement discussions conducted by The Honorable Harvey A. Schneider, Judge, Superior Court for the County of Los Angeles, a settlement agreement was entered into between PEI and Kingston, and approved by the Superior Court whereby, among other things, the PEI chose in action against WMATA was assigned to Kingston.

On May 5, 1994, the Superior Court entered a default judgment against WMATA.

Thereafter Kingston sought to enforce the judgment. In September, 1994, only after Kingston expended considerable effort locating attachable assets, and having located WMATA assets in California, WMATA moved to vacate the default judgment and to quash service of summons, asserting a lack of both personal and subject matter jurisdiction. In that same motion, WMATA also sought a modification of the judgment entered below to reduce the amount of the judgment and to eliminate attorney's fees from the judgment. After a hearing, the trial court granted WMATA's motion, finding a lack of subject matter jurisdiction. The trial court did not reach the issues of personal jurisdiction or address the issue of whether the judgment should be modified. Thereafter, Kingston brought a Motion for Reconsideration pursuant to California Code of Civil Procedure § 1008, which the Superior Court denied on October 14, 1994.

Kingston then appealed the order vacating the default judgment to Division Two of the Second Appellate District of the Court of Appeal of California. The Court of Appeal affirmed the trial court's order that the default judgment be vacated on the grounds that the trial court lacked subject matter jurisdiction.

Kingston then petitioned the California Supreme Court for review. The California Supreme Court granted review and affirmed the judgment of the Court of Appeal, holding that state courts, except those of Maryland and Virginia, had no jurisdiction over actions involving WMATA.

Consideration of Federal Questions in the Courts Below

The Trial Court

The California Superior Court concluded that the Compact creating WMATA prohibits the filing of a suit against WMATA in any state court except those of Maryland and Virginia. The Superior Court reasoned:

> The only evidence that the Compact intended that there be jurisdiction in any other state is the removal statute itself. Interpreting the removal provision to apply solely to the state actions brought in Maryland and Virginia, however, has the virtue of reading the Section in a tight and consistent manner.
>
> Read this way, the phrase "any such action initiated in a state court" refers specifically to those actions identified in the previous sentence in which a litigant chooses to bring in the state courts of either Maryland or Virginia. This reading also has the virtue of limiting jurisdiction in state courts only in those courts which signed the Compact and through which the transit system runs. Under these circumstances, such a jurisdictional accommodation is plausible.

In commenting upon the language of the Compact which limited jurisdiction over WMATA actions to the state courts of only Maryland and Virginia, Judge Schneider noted:

> I would be less than candid if I did not tell you that that is a less than clear expression of

congressional will.

The Trial Court did not address the question of the unequal grant of judicial authority, and whether Congress could exclude the California courts (and the courts of 48 other States) from hearing actions against WMATA.

The California Court of Appeal

The California Court of Appeal affirmed the trial court's order, holding that the trial court properly vacated the default judgment based on lack of subject matter jurisdiction.

The Court of Appeal reasoned:

> . . . the Compact refers to original jurisdiction in the same sentence as the reference to the two states, which leads to the conclusion that Congress intended State jurisdiction to be limited to Maryland and Virginia. We agree that conferring original jurisdiction without more does not confer exclusive jurisdiction, or divest state courts of their concurrent jurisdiction, and we agree with the trial court that the language of the Compact could have been clearer. There is more in the Compact, however. To find that there is concurrent jurisdiction in all state courts would make superfluous the mention of two specific states. Thus, even if the Compact does not clearly, explicitly confer jurisdiction on the federal district courts, and the two state courts, it impliedly does so. *Kingston Constructors Inc. v. WMATA*, 49 Cal.App.4th 257, 262, (1996).

The California Court of Appeal also dismissed the contention that a preemption of the historic powers of the states requires unmistakably clear expression of intent.

The California Supreme Court

The California Supreme Court affirmed the judgment of the Court of Appeal, holding that:

> . . . section 81 of the WMATA Compact impliedly denies jurisdiction of WMATA actions to the courts of states other than Maryland and Virginia -- more precisely, it impliedly denies them original jurisdiction. It explicitly includes Maryland and Virginia courts. It thereby implicitly excludes the rest. *Expressio duroru, exclusio ceterorum.* The WMATA Zone does not embrace territory belonging to any of the other states. As a result, it does not encompass geographical area within which their courts could properly exercise judicial power.

The California Supreme Court concluded that the restriction of jurisdiction to the courts of the United States and to those of Maryland and Virginia, was valid pursuant to Congress' power under article I, section 8, Clause 17 of the United States Constitution to legislate over the District of Columbia as the Seat of the Government of the United States, and Congress' power under article I, section 8, clause 3 of the United States Constitution to regulate Commerce among the several states.

The California Supreme Court dismissed Kingston's contentions that the selective grant of jurisdiction to the

states of Maryland and Virginia was unconstitutional on the grounds that (1) the District of Colombia was included as a state, (2) the law was beyond the power of Congress, and (3) that such a grant of selective jurisdiction invidiously discriminated in favor of Maryland and Virginia and against the other states. Neither the Court of Appeal nor the California Supreme Court addressed the unequal footing of the state courts caused by the Compact.

REASONS FOR GRANTING THE WRIT

I. THE CALIFORNIA SUPREME COURT'S OPINION IS CONTRARY TO THE REQUIREMENT OF AN EXPRESS STATEMENT OF LEGISLATIVE INTENT WHEN DIVESTING STATES' COURT'S OF JURISDICTION.

The California Supreme Court has decided an important federal question in a way that conflicts with relevant decisions of this Court. The California Supreme Court has decided that Congress, through the compact process, may alter the balance of power among the various states of the union, without a clear expression of intent.

The California Supreme Court concluded that the restriction of jurisdiction to the courts of the United States and to those of Maryland and Virginia, was a valid exercise of congressional power. This finding resulted in the Court's determination that Congress could, through the compact process, grant or withhold powers to states on a selective basis. The California Supreme Court employed a six step analysis in reaching its conclusion. The California Supreme Court found the fifth step in its analysis the most critical, stating that because section 81 of the WMATA Compact

explicitly included Maryland and Virginia courts, it implicitly excluded the rest, relying upon the Latin maxim, "*Expressio duorum, exclusio ceterorum.*" Both the California Appellate Court and California Supreme Court decisions rest on the premise that a statue can impliedly divest state Courts of jurisdiction.

The California Supreme Court acknowledged that a presumption exists that state courts enjoy concurrent jurisdiction with federal courts, citing *Gulf Offshore Co. v. Mobil Oil Corp.* 453 U.S. 473, 478 [69 L.Ed.2d 784, 101 S.Ct. 2870] (1981). Then, the California Supreme Court, dismissed this requirement, because the language of Section 81 of the WMATA Compact was not totally silent as to state court jurisdiction. In the words of the California Supreme Court:

> Under *Yellow Freight System, Tafflin, Gulf Offshore Co.*, and *Dowd Box Co.*, there is indeed a "presumption of concurrent jurisdiction" between federal courts and state courts. . . . But that presumption arises *when the jurisdiction provision in question is silent as to the jurisdiction of state courts.* That is not the case here. (Emphasis included in original text.)

Thus, the courts with presumed concurrent jurisdiction, Virginia and Maryland, were explicitly mentioned, while those being divested of presumed concurrent jurisdiction were alluded to by implication only.

This Court has consistently held that altering the traditional rights of states calls for an express declaration. As was set forth in *Welch v. Texas Department of Highways and*

Public Transportation, 483 U.S. 468, 477 (1987):

> . . . the constitutional role of the States sets them apart from other employers and defendants. As the dissenting opinion in *Parden* states:
>
> > It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another. Only when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense.

In *Welch v. Texas*, ibid, an employee of the Texas Highways Department was injured while working on a ferry dock operated by the Department. She filed suit against the Department and the State under § 33 of the Jones Act, which provides that any seaman injured in the course of his employment may maintain an action for damages at law in federal district court, and which, in effect, applies the remedial provisions of the Federal Employer's Liability Act (FELA) to such suits. The District Court dismissed the action as barred by the Eleventh Amendment and the Court of Appeals affirmed. Although recognizing that *Parden v.*

Terminal Railway of Alabama Docks Dept., 377 U.S. 184 (1964), held that an employee of a state-operated railroad may bring an FELA action in federal court, the Court of Appeals held that the decision was inapplicable in light of Congress' failure to include in the Jones Act an unmistakably clear expression of its intention to abrogate the States' Eleventh Amendment immunity from suit in federal court. The court also held that Texas had not consented to being sued under the Jones Act. This Court affirmed.

Requiring a clear expression of congressional intent serves a twofold purpose. First, it removes any ambiguity with respect to the interpretation and application of the statute among the several states. Secondly, it provides the various members of congress with a uniform understanding of the legislation's impact.

As stated in the Federalist, No. 82:

> . . . the State courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.
>
> . . . .
>
> and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth.

In this case, the statutory language reserving power to the judiciary of two states, while divesting others, is the type of invasion of well established constitutional principles that demand an unmistakably clear expression of congressional intent.

II. THE CALIFORNIA SUPREME COURT'S OPINION VIOLATES THE PRINCIPAL THAT THE STATES REMAIN EQUAL IN DIGNITY AND POWER.

The California Supreme Court held that the selective grant of jurisdiction of WMATA actions only to the courts of the United States and to the courts of Maryland and Virginia did not violate the United States Constitution. [1]

This holding, that Congress could selectively deny jurisdiction to some state courts leads to the premise that the California Supreme Court would accept the notion that Congress could grant jurisdiction over a specific issue to 49 states to the exclusing on one, or grant jurisdiction to all states south of the Mason Dixon lient to the exclusion of all other states.

In 1850, California was admitted as a State to the Union "on an equal footing with the original States in all respects whatever." 9 Stat. 452. *California v. United States,* 438 U.S. 645, (1978)

The Federal Government cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution. *Pollard's Lessee v. Hagan*, 3 How. 212 (1845).

1

This inequality of power among states, and congressional discrimination among states admitted to the union on an equal footing has no more place within our constitutional structure than the 1820 Missouri Compromise which attempted to establish that new states would be admitted in pairs, one slave and one free.

As this Court explained in *Coyle v. Smith*, 221 U.S. 559 (1911):

> In *Texas v. White*, 7 Wall. 700, 725, late Chief Justice Chase said in strong and memorable language that, "the Constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible States."

Citing *Lane County v. Oregon*, 7 Wall. 76, late Chief Justice Chase explained:

> The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union, there could be no such political body as the United States.
>
> To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears, we may remain a free people, but the Union will not be the Union of the Constitution.

The argument that Congress derives from some other source the power to impose restrictions upon a State which deprives it of equality with other members of the Union, has no merit, and ". . . there is to be found no sanction for the contention that any State may be deprived of any of the power constitutionally possessed by other States, as States." *Coyle v. Smith*, id.

James Madison, in the year 1819, speaking with reference to the prohibitory power claimed by Congress, then threatening the very existence of the Union, remarks of the language of the second clause of the third section of article fourth of the Constitution:

> As to the power of admitting new States into the Federal compact, the questions offering themselves are whether Congress can attach conditions, or the new States concur in conditions, which after admission would abridge or enlarge the constitutional rights of legislation common to other States; whether Congress can, by a compact with a new State, take power either to or from itself, or place the new member above or below the equal rank and rights possessed by the others; whether all such stipulations expressed or implied would not be nullities, and be so pronounced when brought to a practical test. It falls within the scope of your inquiry to state the fact that there was a proposition in the convention to discriminate between the old and the new States by an article in the Constitution. The proposition, happily, was rejected. The effect of such a discrimination is sufficiently evident. *Scott v. Sandford*, 60

U.S. 393 (1856), DANIEL, Separate Opinion

Equality of constitutional right and power is the condition of all the States of the Union, old and new. *Coyle v. Smith*, 221 U.S. 559 (1911).

In Federalist No. 81, the founders cautioned against limiting actions to state tribunals where "local spirit" might sway justice:

> . . . the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union.

CONCLUSION

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

Statutory language which reserves power to the judiciary of two states, while divesting others is the type which requires a clear expression of congressional intent to remove any ambiguity with respect to the interpretation and application of the statute, among the several states, and provide the various members of congress with a uniform understanding of the legislation's impact.

In this case, the statutory language reserving power to the judiciary of two states, while divesting others, is the type on invasion of well-established constitutional principles that demand an unmistakably clear expression of congressional

intent.

The judges in the trial court and in the Court of Appeal all agreed that the language of the Compact was not clear. Under this circumstance alone, the Compact should be sent back to Congress for clarification. Notwithstanding other constitutional questions of equal footing, The California Supreme Court has held that the language of the compact only implies what must be explicit and clear.

Even if clear, such legislation is not permissible under the "equal footing" doctrine which demands that equality of constitutional right and power is the condition of all the States of the Union. The selective grant of jursidiction to only the courts of identified states mocks the efforts and lives expended in preserving a union of equal states with republican forms of government.

Respectfully submitted,

Ronald K. Losch
Attorney for Petitioner
Kingston Constructors Inc.